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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re JOSE CHAVEZ, on Habeas Corpus.	B218818 (Los Angeles County Super. Ct. No. BH005814)

APPEAL from an order of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Charles Chung, Deputy Attorneys General, for Appellant Matthew Martel, as Warden, etc.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Respondent Jose Chavez.

After the Governor reversed the grant of parole by the Board of Parole Hearings (the Board) to prison inmate, Jose Chavez (Chavez), Chavez filed a petition for writ of habeas corpus in the Superior Court of Los Angeles County. The court found that the Governor's decision was not supported by the requirement of "some evidence" that his release would constitute a current threat to public safety.[1] The court granted the petition and reinstated the Board's decision. Matthew Martel, Warden of Mule Creek State Prison (Warden) appeals the superior court's order, challenging only the court's remedy of reinstating the Board's decision, rather than remanding to the Governor for further review. We reject the Warden's contention, and affirm the order reinstating the Board's decision.

BACKGROUND

On March 24, 1991, when Chavez was 18 years old, he and two companions, Richard Diaz and Abracio Lopez, went in search of rival gang members to kill in retaliation for the murder of one of their own gang members. They found three victims sitting in a car. Diaz fired several shots at them, killing one and wounding another. The third escaped uninjured. Chavez pled guilty to second degree murder, two counts of attempted murder, and shooting at an occupied vehicle. He disassociated himself from the gang and gave information to the police about his companions, who were convicted of all charges. Chavez was sentenced to a term of 15 years to life in prison.

Prior to his incarceration, Chavez had been convicted as a juvenile of vandalism ("tagging"), and as an adult of misdemeanor fighting in public. The fight was related to his gang involvement. While in prison, Chavez had five "CDC 115" disciplines, the last

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[1] Ordinarily, in reviewing the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, the standard of review is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191, 1212 (*Lawrence*).) Here, the Warden does not contend that the Governor's decision was supported by some evidence.

one in 1999, and two "128" violations.[2] The first violation occurred in 1994, when he armed himself with a knife after hearing that he had been targeted for giving evidence against his fellow gang members.[3] As a result, he pled guilty to possession of a deadly weapon by a prisoner, and was sentenced to an additional 16 months in prison. He received CDC 115 disciplines in 1994 for failure to report and possession of alcohol, and in 1999 for disobeying orders. His less serious 128 violations occurred in 1994, 1999, 2000, and 2001.

In 1999, Chavez gained some insight into his behavior, and decided to do better for himself and his family. He had already earned a GED, and went on to obtain certificates in refrigeration and auto machine shop. He was employed, attended Alcoholics Anonymous, numerous self-improvement and rehabilitation workshops, and another 12-step program, Criminals and Gang Members Anonymous.

The Board's psychologist reported that Chavez's 2006 psychological evaluation remained viable and appropriate for his parole hearing of August 21, 2008. In the 2006 evaluation, clinical psychologist Frank D. Webber, Ph.D., found Chavez to have a high GAF (Global Assessment of Functioning) score, with no significant emotional or cognitive impairment. Dr. Webber noted that Chavez had a prior history of being diagnosed with antisocial personality disorder, as well as a history of criminal activity prior to incarceration, including significant gang involvement. Nevertheless, Dr. Webber concluded that Chavez was in the lowest possible risk category for violence, due to enumerated factors: He had been discipline-free since 1999, and had never been disciplined for violence; he had successfully participated in work, vocational, educational, and self-help programs; further, he maintained strong family bonds, showed

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2 A "CDC 115" violation is one that is "believed to be a violation of law or [that] is not minor in nature," and a "128" is minor misconduct that recurs after verbal counseling. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2)–(3).) "CDC" apparently means the Department of Corrections and Rehabilitation.

3 Chavez was later slashed on the neck by gang members, and was moved to the "Sensitive Needs Yard."

remorse, had gained considerable insight, and had a sincere desire to change. In addition, Dr. Webber found that Chavez understood that he was an addict who could not drink again, and he concluded that Chavez was committed to abstinence and the 12-step life.

At the parole hearing, the Board heard Chavez's testimony, and considered the letters of support from family, friends, and a prison chaplain. Relatives in California and Mexico offered a home to Chavez, but because he was certain to be deported, Chavez told the Board that he would live with his aunt and uncle in Mexico, where they also had a job waiting for him. The Board heard the statements of Chavez and counsel, and permitted questioning by a Los Angeles County Deputy District Attorney, who did not oppose parole. The Board had sent out "3042 notices,"[4] and the only opposition to parole came from the Los Angeles Police Department.

In its decision, the Board summarized the crime, the testimony, and other evidence, weighed all the considerations under the California Code of Regulations, title 15, section 2404, and found Chavez suitable for parole.[5] On January 16, 2009, the Governor invoked his authority to reverse the Board's decision, and issued a statement of reasons. Chavez challenged the Governor's decision in a petition for writ of habeas corpus, which the superior court granted August 19, 2009. The court vacated the Governor's decision, and reinstated the Board's grant of parole. The Warden filed a timely notice of appeal, and we denied his request for stay. Chavez was released to federal authorities and deported to Mexico.[6]

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[4] Penal Code section 3042 requires the Board to notify in writing, at least 30 days before a parole hearing "each of the following persons: the judge of the superior court before whom the prisoner was tried and convicted, the attorney who represented the defendant at trial, [and] the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case . . . ."

[5] Title 15, section 2402 of the Code of Regulations enumerates factors tending to show unsuitability for parole and those tending to show suitability.

[6] We asked counsel for both parties whether the appeal was moot, and invited them to brief the issue. We conclude that Chavez's deportation does to render the appeal moot.

DISCUSSION

The Warden's sole contention on appeal is that the superior court should have remanded the matter to the Governor for further review, rather than reinstate the Board's decision. Pointing out that the power to grant parole is vested exclusively in the executive branch, the Warden argues that the court's only role should be to determine whether the required procedural due process was afforded the inmate, and if not, to remand for a new hearing affording the rights denied in the first hearing. (See, e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 480; *In re Prewitt* (1972) 8 Cal.3d 470, 473–475.)

The Warden relies on *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*), where the California Supreme Court held that the appropriate remedy when the decision of the *Board* is not supported by some evidence is to order the Board to vacate its decision denying parole, and conduct a new hearing. The Court did not reach the question of what remedy is appropriate upon finding that the Governor's decision is unsupported by some evidence, nor did the courts in other cases upon which the Warden relies. (See *In re Ramirez* (2001) 94 Cal.App.4th 549, 572, disapproved on another point in *In re Dannenberg* (2005) 34 Cal.4th 1061, 1081–1083; *In re Bowers* (1974) 40 Cal.App.3d 359, 362.) He contends, however, that there should be no difference in remedy when a gubernatorial decision is vacated.[7]

(Cf. *U.S. v. Campos-Serrano* (1971) 404 U.S. 293, 294, fn. 2 [government's petition for certiorari not moot after respondent's deportation]; *People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 900 [defendant's appeal challenging probation conditions not moot after deportation].)

[7] The Warden suggests that this issue is before the Supreme Court in *In re Prather* (Apr. 28, 2009, B211805) [nonpub. opn.] review granted July 29, 2009, S172903, and *In re Molina* (Apr. 16, 2009, B208705) [nonpub. opn.] review granted July 29, 2009, S173260.) The issue presented in those cases, however, is the proper remedy where a court finds that it cannot uphold a Board decision to deny parole, not a gubernatorial decision to reverse the Board's grant of parole.

The remedy cannot be the same in both circumstances. Although the Board can give the prisoner a new hearing and consider additional evidence, the Governor cannot. (*In re Smith* (2003) 109 Cal.App.4th 489, 507.) When the Governor's decision is vacated by the court, remand does not result in a new hearing, because the Governor's decision to affirm, modify, or reverse the decision of the Board must be based on the same factors and the same materials that guided the Board's decision. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 659–661; Cal. Const., art. V, § 8, subd. (b); Pen. Code, §§ 3041, 3041.2, subd. (a); see Cal. Code Regs., tit. 15, §§ 2281, 2402.) "Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court's unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board's decision. [Citations.]" (*In re Masoner* (2009) 179 Cal.App.4th 1531, 1538.)

The Warden has cited no authority requiring remand to the Governor after he has reversed the Board's parole grant. Indeed, the Supreme Court has affirmed a similar judgment that had afforded the remedy of reinstating the Board's parole release order. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190, 1201, 1229.) Declining to remand to the Governor for further consideration has been the approach of many appellate decisions since *Lawrence*—all recognizing that when the record reflects no evidence supporting the denial of parole, the proper disposition is to avoid remand and, in effect, to order the release of the inmate. (See, e.g., *In re Moses* (2010) 182 Cal.App.4th 1279, 1313–1314; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256–257; *In re Burdan* (2008) 169 Cal.App.4th 18, 39; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386–387; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491–1492.)

For the first time in his reply brief, the Warden suggests that new evidence shows Chavez to be unsuitable for parole, and contends that public safety can be protected only by a remand to the Governor. We disagree. The Board retains the power to rescind parole based upon new evidence, after affording the parolee a new hearing. (Pen. Code,

§§ 3041.5, 3041.7; Cal. Code Regs., tit. 15, § 2450; *In re Powell* (1988) 45 Cal.3d 894, 901–902.) If and when Chavez is given a new hearing by the Board, the Governor may review the Board's decision. (See Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2, subd. (a).) The Governor does not, however, take new evidence or make the initial decision to revoke parole. (*In re Gray* (2007) 151 Cal.App.4th 379, 402; *In re Smith*, *supra*, 109 Cal.App.4th at p. 507.)

Accordingly, we conclude that the appropriate remedy was to vacate the Governor's decision and reinstate the Board's grant of parole, as the superior court ordered.

DISPOSITION

The superior court's order granting Chavez's petition for writ of habeas corpus is affirmed. Thus, the Governor's 2009 decision reversing the Board's 2008 grant of parole remains vacated, and the Board's 2008 grant of parole is reinstated on the terms and conditions stated therein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ